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No. 84-75

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In The
Supreme Court of the United States
October Term, 1984

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BEULAH WILBUR,

Petitioner

v.

THE SOUTHERN GALVANIZING COMPANY,

Respondent

— o —
**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

— o —
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QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER THE PETITION SHOULD BE GRANTED UNDER SUPREME COURT RULE 17.1, WHERE PETITIONER HAS ARTICULATED NO SPECIAL OR IMPORTANT REASONS THEREFOR.
 - A. Whether the Petition should be granted where the basis for review would be concurrent factual determinations by two lower courts.
 - B. Whether the Petition should be granted where it raises no issues with ramifications for other cases, but has importance only to the parties.
- II. WHETHER THE PETITION SHOULD BE GRANTED WHERE THE QUESTION PRESENTED BY PETITIONER WAS NEITHER ARGUED NOR BRIEFED IN THE TWO LOWER COURTS.

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Respondent, The Southern Galvanizing Company, respectfully prays that this Court deny the petition for a writ of certiorari to review the April 16, 1984 judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, unreported, appears in Petitioner's Appendix A at pages 21-31. The appellate court affirmed the order of the United States District Court for the District of Maryland granting Respondent's motion for judgment notwithstanding the verdict. The memorandum opinion of the trial court appears in Petitioner's Appendix B at pages 32-50.

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RESPONDENT'S STATEMENT OF THE CASE

This is an action for damages resulting from termination of employment brought under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The facts material to this case are well summarized by the Fourth Circuit in its opinion at pages 22-25 of Petitioner's Appendix. The relevant facts are set forth in more detail in the memorandum opinion of the District Court at pages 33-40 of Pet. App.

Respondent disagrees with certain matters contained in Petitioner's Statement. With regard to the steps taken by Respondent to remedy its poor financial condition, it borrowed money not from its shareholders, but from its President, Michael Hettleman and from his wife, also an employee. Pet. App. at 36. While Petitioner asserts that Respondent's General Manager held a meeting of remaining office staff on the day of Petitioner's discharge and told them there would be no further changes, the General

Manager specifically denied making such a statement. Finally, Respondent disagrees with Petitioner's statement that "all of the salaried personnel received substantial raises." In fact, these employees received only cost of living increases. Pet. App. at 36.

Respondent deems it appropriate to apprise the Court of additional facts omitted from Petitioner's Statement in order to more fully set forth its financial condition at the time of Petitioner's discharge and the economics of that discharge and others in the same time period. Respondent's tax losses for the period 1977-80 exceeded a half-million dollars. Pet. App. at 34. Respondent's President, and his wife loaned the company \$270,000.00 at a below market rate of 9% interest and subordinated repayment to notes held by a bank. Pet. App. at 36. Mr. Hettleman drew no salary or other remuneration during the period of the discharges. Respondent restricted the geographic area of its operations drastically, cut production shifts, and raised prices 18%. Pet. App. at 36.

Full-time clerical positions with Respondent, of which Petitioner had held one, decreased from five to three. The three remaining clerical employees all had specific skills which Petitioner lacked, such as computer and accounting capabilities. Pet. App. at 24, 30, 34. These remaining employees performed Petitioner's duties after her discharge in addition to their own. Petitioner's principal job task had been operating a manual telephone switchboard, which was replaced with more modern equipment. Pet. App. at 25, 29, 34. Both salaried and union employees received cost of living pay increases effective January 1, 1980, within two months of Petitioner's termination. Nevertheless,

Respondent's total salary and wage expenses decreased drastically from 1979 to 1980, due to substantial reductions in levels of employment. Pet. App. at 36, 37.

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REASONS FOR DENYING THE WRIT

I. The Court Should Deny The Petition Under Supreme Court Rule 17.1, Since No Special Or Important Reasons Are Raised For Review.

A. The Court should not review concurrent factual determinations by two lower courts.

Supreme Court Rule 17.1 provides in part that "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor". The Petition for Writ of Certiorari does not specify what makes this case special or important such that the Court should exercise its discretion to grant certiorari. It is clear that the reasons identified in Rule 17 are not applicable to this case. There is no suggestion that the Court of Appeals for the Fourth Circuit decided this case in a way that conflicts with the decision of any other court. Indeed, because the opinions of both the District Court and the Court of Appeals are restricted to the facts of this case, it is hard to see how they could conflict with decisions of other courts and Petitioner does not so claim. Nor does Petition state that the Fourth Circuit departed from the usual course of judicial proceedings so as to call for this Court's supervision. The instances enumerated in sections b and c of Rule 17.1 are obviously inapplicable to the instant case.

The memorandum opinion of the District Court granted Respondent's motion for judgment notwithstanding the verdict on the alternative grounds that Petitioner had failed to rebut Respondent's proffered justification for her discharge and that the evidence as a whole did not support the verdict. The Court of Appeals affirmed, emphasizing that Petitioner "had failed to demonstrate that [Respondent's] business justification for her termination was pretextual". Pet. App. at 29. Petitioner herself recognizes the essentially factual nature of this dispute when she begins the section of her Petition entitled Reasons For Granting This Writ by stating that she "presented sufficient evidence to rebut the Defendant's articulation of a legitimate non-discriminatory reason for her discharge".

This Court has repeatedly held that a third judicial factual determination is not a sufficient reason for granting a petition for certiorari. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1937) was a review of patent litigation by writ of certiorari. The Court refused to consider certain issues because they involved review of evidentiary findings. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it . . . Moreover, the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support." 304 U.S. at 178.

Similarly, the Court refused to disturb a factual conclusion concerning qualifications for naturalization in *Berenyi v. District Director, Immigration and Naturalization Service*, 385 U.S. 630 (1967). The *Berenyi* decision cited "this Court's repeated pronouncements that it 'cannot undertake to review concurrent findings of fact by two

courts below in the absence of a very obvious and exceptional showing of error". 385 U.S. at 635.

B. The Petition should not be granted because the case has ramifications only for the parties.

The Petition cites no rule of law which devolves from the decisions of the lower courts, the application of which might affect the outcome of other cases. Neither of the opinions of the lower courts has been published. An examination of the memorandum opinion of the District Court shows that it is carefully qualified by reference to the facts of this case. The trial court's recitation of those facts is detailed and occupies seven pages of Petitioner's Appendix. The District Court rejected Respondent's argument that Petitioner had failed to establish a *prima facie* case, thereby avoiding the one holding that could have served as precedent. Instead, the Court found that "the plaintiff failed to successfully rebut the Southern Galvanizing Company's specifically advanced business justification; and, in addition, that the evidence taken as a whole, did not support a plaintiff's verdict". Pet. App. at 50.

The Fourth Circuit also rendered an opinion confined narrowly to the facts of this case. Rather than forging some ruling applicable to other cases, the Court of Appeals chose to limit itself to an assessment of Petitioner's evidence on discriminatory animus and Respondent's evidence of business justification. "We are satisfied that the District Court properly took into account the underlying facts in assessing the reasonableness of the inference that Wilbur's termination was motivated by age dis-

crimination in light of the business justification articulated by Southern Galvanizing". Pet. App. at 31.

In sum, the decisions of the lower courts address only the interests of the parties to this litigation and have no ramifications for other litigants or potential litigants. In *Rice v. Sioux City Memorial Park Cemetary, Inc.*, 349 U.S. 70 (1955), this Court dismissed a writ of certiorari as improvidently granted where a decision would have carried no meaning for others in analogous situations. Citing Chief Justice Taft, the *Rice* Court reiterated that "... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal". 349 U.S. at 79.

II. The Petition Should Not Be Granted Where The Question Presented Was Neither Ar- gued Nor Briefed In The Two Lower Courts.

In her Petition, Petitioner defined the question presented as "Whether the District Court deprived the Plaintiff of her right to a jury trial by granting judgment n.o.v. after she had presented evidence of discrimination beyond a *prima facie* case, and which rebutted the defendant's articulated non-discriminatory reason for her termination?" The exact basis for the formulation of this question is not easy to discern, since the right to a jury trial is not even mentioned in the balance of the Petition. If we assume that granting judgment notwithstanding the verdict is claimed to violate the Seventh Amendment, it is clear that

no such constitutional infirmity results, even where the Court of Appeals overturns a verdict upheld by the trial court. *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 298 (1967), reh. denied 386 U.S. 1027 (1967).

Without resorting to any consideration of the merits *vel non* of this issue, the Court should decline to consider it because Petitioner failed to raise it in either of the lower courts. In the District Court, Petitioner had the opportunity to raise any issue relating to the right to jury trial in her memorandum in opposition to defendant's motion for judgment notwithstanding the verdict. She failed to do so. It is apparent from an examination of the trial court's memorandum opinion that it did not consider the issue presented by Petitioner here.

Nor did Petitioner raise her jury trial issue in the Fourth Circuit. The subject of the Seventh Amendment was not broached in Appellant's Brief or in oral argument. Consequently, the Court of Appeals did not address the issue in its opinion.

In *Miree v. De Kalb County*, 433 U.S. 25 (1977), this Court vacated and remanded to the Fifth Circuit a decision in airplane injury and death litigation. One theory of liability was not considered on writ of certiorari because it was "neither pleaded, argued nor briefed either in the District Court or in the Court of Appeals . . ." 433 U.S. at 34. See also, *United States v. Lovasco*, 431 U.S. 783, 788 (1977) and *Emspak v. United States*, 349 U.S. 190, 198 (1955), where this Court expressed reluctance to consider issues not raised below. Although issues raised for the first time in the Supreme Court were considered in *Rogers v. United States*, 422 U.S. 35 (1975), Petitioner's counsel

there was not even aware of the new grounds for reversal until certiorari was granted. No such exceptional circumstances are present in this case. Whatever constitutional implications the judgment notwithstanding the verdict may have were available for briefing and argument in both of the lower courts.

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CONCLUSION

Inasmuch as there are no special or important reasons for reviewing the case, the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, should be denied.

Respectfully submitted,

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